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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DELPHINE ALLEN; et al;

Plaintiff,

vs.

CITY OF OAKLAND, et al.,

Defendant.

MASTER CASE NO. C-00-4599 TEH

**REDACTED PUBLIC VERSION OF JOINT
RESPONSE TO ORDER RE: SEPTEMBER
22, 2011 STATUS CONFERENCE**
Honorable Thelton E. Henderson

1 In its August 25, 2011 sealed order, the Court requested that the parties file a joint response
 2 on or before September 2, 2011 that addresses (1) whether any part of the sealed order should be
 3 redacted before it is filed in the public record; and (2) whether any portion of the status conference
 4 and joint status statement should be sealed. The Court directed that the parties file their joint
 5 response in the public record, with appropriate redactions, and that the parties file the unredacted
 6 response under seal.

7 The parties have discussed the confidentiality issues and hereby submit this joint response
 8 asking that the Court seal certain parts of its Order and allow the parties to file confidential and
 9 privileged information under seal. Further, the parties request that portions of the status conference
 10 hearing which require discussion of confidential and privileged information be held in chambers.

11 **1. Proposed Redactions to the Sealed Order**

12 **City's Position.**

13 The City respectfully requests that the Court redact from the Sealed Order before it is made
 14 public the name of Officer X and the reference to the Internal Affairs Division ("IAD") and
 15 Executive Force Review Board ("EFRB") determinations [redacted] unless and until it is
 16 determined if said findings have been made public. With regard to the *Smith v City of Oakland* case
 17 the City also requests that the IAD determination that the complaint in that matter was [redacted] be
 18 redacted prior to the Sealed Order being filed in the public record unless and until it is determined
 19 said finding is a matter of public record.

20 **Plaintiffs' Position**

21 Plaintiffs' attorneys will use the term "Officer X:" in this public filing until the court makes a
 22 determination as to what part of its order will be made public. However, Plaintiffs' attorneys
 23 completely disagree that Officer X's name should be redacted in every instance. Officer X's name
 24 and his case has been the subject of substantial news coverage including a San Francisco Chronicle
 25 article where his arbitration case was discussed in detail; the arbitrator's name was mentioned and
 26 parts of his opinion were quoted verbatim; and Officer X's OPOA attorney was quoted that Officer X
 27 was a "victim of political persecution". Plaintiffs' attorneys believe that Officer X's attorney waived
 28 any claim of confidentiality when he made his public statements. Furthermore, pursuant to Penal

1 Code 832.7 (d) “a department or agency that employs peace or custodial officers may release factual
2 information concerning a disciplinary investigation if the officer who is the subject of the disciplinary
3 investigation, or the officer’s agent or representative, publicly makes a statement he or she knows to
4 be false concerning the investigation or the imposition of disciplinary actions.” See Penal Code 832.7
5 (d). In addition, state law privileges are not uniformly applied in Federal Court.

6 Moreover, the Woodfox v. City of Oakland court file is not sealed. In fact, the City of
7 Oakland has never even requested that the court file be sealed. Plaintiffs' attorneys have also been
8 informed that the arbitrator's decision is a public document and are formally requesting that the City
9 of Oakland forward a copy of this document to the Court and Plaintiffs' counsel, or formally explain
10 how the arbitrator's decision is not a public document. While Internal Affairs information should be
11 made confidential, this does not extend to every single aspect of Officer X's conduct, Officer
12 X's identity, and the fact that an arbitrator reinstated him. Moreover, it is simply not fair to allow
13 Officer X’s attorney, the City and others to make public comments about Officer X and his conduct,
14 and then urge the court to sanitize every court document and omit his name.

15 **OPOA’s statement:**

16 The OPOA concurs with the City's position as set forth hereinabove.

17 **2. Reinstatement of Officer X**

18 **Plaintiffs’ statement:**

19 Plaintiffs’ attorneys in this case were also the attorneys in the lawsuit which concerned the
20 incident and conduct that led to X’s termination. Officer X’s termination was then reversed by an
21 arbitrator.

22 Plaintiffs’ attorneys agree with defense counsel that personnel decisions regarding X’s future
23 should probably be addressed in a confidential manner given the restricted nature of California law
24 on this subject. We also agree that any filings or discussions that may take place regarding the
25 process used by the City and OPOA for selecting arbitrators in police cases can be made public.

26 Plaintiffs’ attorneys’ strongly believe that the OPD could have successfully terminated Officer
27 X. We would like to address our reasons for this opinion to the court. Plaintiffs’ attorneys hired an
28 investigator who discovered two witnesses to the incident. They made shocking allegations

1 concerning the OPD's treatment of them at the scene of the incident which will be discussed in detail
2 in our Case Management Conference Statement.

3 Plaintiffs' attorneys see no reason why the information concerning these witnesses should not
4 be public. These witnesses were developed in our investigation. They were not part of the internal
5 affairs investigation.

6 Plaintiffs' attorneys also wish to discuss other aspects of the Officer X's shooting incident
7 that do involve confidential material. This information should be in a confidential filing and
8 therefore, if the Court decides that Officer X's name can be made public along with other information
9 already in the public domain, Plaintiffs' attorneys will be submitting a "public" Case Management
10 Conference Statement and a "confidential" Case Management Conference Statement

11 **City's statement:**

12 Officer X was terminated by the City not because the Plaintiffs filed the Woodfox case but in
13 response to the City's own IAD Investigation and the EFRB findings that the subject officer violated
14 OPD policies prohibiting the use of excessive force. He was ordered reinstated to his position as an
15 OPD Officer by an independent Arbitrator and the City had to comply with the Arbitrator's ruling
16 under the Memorandum of Understanding between the City and the OPOA. The City contends that
17 information pertaining to the Officer X's work activities and future work assignments are confidential
18 personnel matters and should not be discussed publicly. The IAD and EFRB's findings are also
19 confidential unless they have been published or otherwise made public. Information pertaining to
20 the process the City and OPOA use to select arbitrators in police cases is not confidential and neither
21 are the credentials and qualifications of the Arbitrator who ordered the officer's reinstatement.
22 However, the opinions of the City and the OPOA regarding whether the Arbitrator was qualified to
23 decide the X arbitration should not be addressed in open court. The City's actions and efforts to
24 address the arbitrator's decision are confidential and privileged and can be disclosed only to the Court
25 unless the City Council waives its closed session privilege. The City will address substantive issues
26 as well as the confidentiality of any new information the Plaintiffs' attorneys provide respecting the
27 conduct of police officers at the scene of the Woodfox shooting and the quality of IA's investigation.

OPOA's statement:

The OPOA concurs with the City's position as set forth hereinabove. Moreover, the OPOA proposes that, should there be a public exchange in these proceedings concerning the X case, the identity of any other peace officer be maintained on a confidential basis unless previously made public. Further, the OPOA will address issued raised by the Court and Plaintiffs' counsel in this matter in the Case Management Conference Statement to be filed with the Court prior to the September 22nd hearing.

2. Operation Summer "Tune-Up"**Plaintiffs' statement:**

Plaintiffs' attorneys agree with Defendants' attorneys that the specific question the Court has raised regarding the name given to this Operation can be addressed in public.

City's statement:

The City agrees that OPD may discuss in public why the term "Tune-Up" was given to this crime suppression operation. Similarly, the purpose of the operation and the City's partnership with the Alameda County Probation Department can be discussed in public. However, specific information pertaining to implementation strategies, tactical considerations, and other matters that relate to the identification of probationers, police intelligence, and the safety of officers and the public are confidential and privileged and should be discussed in chambers.

OPOA's statement:

The OPOA concurs with the City's position as set forth hereinabove.

3. Internal Affairs Investigation and the Court Verdict in Smith v. City of Oakland**Plaintiffs' statement:**

California Penal Code 832.7 requires that the department or agency shall provide written notification to the complaining party of the disposition of the complaint within 30 days of the disposition. (California Penal Code 832.7 (e)(1)). Therefore, absent a compelling argument by the Defendants' attorneys including some facts why this finding should be made confidential, there should be no reason why there cannot be a public discussion of the OPD's disposition in the matter

1 that Judge Patel found liability and punitive damages. If, however, this discussion alludes to specific
2 parts of the Internal Affairs investigation, that discussion alone should be made confidential.

3 Plaintiffs' attorneys also note that unfounded and exonerated complaints cannot be used
4 in any way except as permitted by California Government Code Section 3304 (f). See California
5 Government Code 832.5 (c). Therefore, any judge's findings, including those findings by Judge
6 Patel, cannot be used against any of the involved parties (including IPAS and promotions) if the OPD
7 made a finding of exonerated or unfounded.

8 Plaintiffs' attorneys also note the following public findings by Judge Patel:

9 6. Officer Mayor was required to complete a "Racial Profiling Stop-Data Collection
10 Form" for this traffic stop. That form was supposed to document the reason for the
11 stop. Officer Mayer was unable to locate a completed stop data form for this incident,
and none was ever produced by the City of Oakland at trial.

12 86. The officers, including sergeants and a lieutenant, have testified that the Police
13 Department requires that forms called stop data forms be completed for all contacts,
14 stops or detentions. Field contact cards may be created for detentions, but are not
required. Arrest reports are to be completed for all arrests. Documentation might not
be produced for consensual encounters.

15 87. The purpose of the stop data forms was to determine whether the Oakland Police
16 Department was engaging in racial profiling and officers were supposed to fill them
17 out for any vehicle, walking stop, and/or bicycle stop. The forms are turned into the
18 Department where the supervisor reviews them for completeness, signs them and
19 places them in a report writing receptacle. There have been problems on occasion
with failure to complete the forms or turn them in; on other occasions some forms
that were turned in had been lost.

20 91. Stop data forms and field contact cards were not produced for any of the other
21 stops or detentions alleged in this case.

22 Plaintiffs' attorneys believe the City of Oakland should give a public explanation for these
23 findings by Judge Patel.

24 **City's statement:**

25 The City's response to the Court regarding the IAD's finding of [redacted], and the steps the
26 City has taken to further review the IAD investigation following Judge Patel's ruling in the *Smith*
27 case will necessitate discussions of confidential personnel matters; therefore the responses should be
28 sealed. The finding of [redacted] should also be sealed because California Penal Code Section

832.7(e) (1) authorizes and requires the City to release the IA finding only to the Complainant and there is no other statutory provision or legal authority which authorizes the City to publicly disclose this information.¹

OPOA's statement:

The OPOA concurs with the City's position as set forth hereinabove.

4. Level 4 Uses of Force Involving Pointing of Firearms

Plaintiffs' statement:

Plaintiffs' attorneys agree with Defendants' attorneys that the filings and discussions in response to the Court's questions are public.

City's statement:

The City agrees that oral and written responses to the Court's questions are not confidential or privileged. However, individual officers' names to the extent they may be relevant to the proceedings should be kept confidential.

OPOA's statement:

The OPOA concurs with the City's position as set forth hereinabove. Furthermore, the OPOA asserts that the filings and discussions on the Level 4 use of force issue should not include a disclosure of individual officers and their respective involvement in use of force.

5. Empanelment of Outside Board to Review Use of Force Incidents

Plaintiffs' statement:

The parties agree that filings and discussions on City policies governing the work and responsibilities of OPD's EFRBs should be public, as well as the general process by which the City of Oakland determines when it is appropriate to empanel an outside independent board to decide a force incident. Plaintiffs' attorneys can see a limited number of issues which might involve confidential materials and will meet and confer with Defendants if such issues are involved here. However, the overall use of City funds to hire consultants and outside investigators should be a public discussion absent any compelling reason to the contrary. This includes how the City

¹ Defendants understand that the Smith proceedings have not resulted in the public disclosure of the City's IA findings

1 determines whether a conflict exists and the criteria used by the City to select panel members when it
2 determines that external review is required.

3 **City's statement:**

4 The process the City uses to decide whether to retain an outside board to hear a Use of Force
5 incident is public information. However, discussions about the City's selection of an outside board
6 and the qualifications of its members as they relate to a pending Use of Force investigation are
7 confidential and should be sealed to protect personnel matters and avoid compromising open
8 investigations.² The City also requests that names of any individual officers that may be relevant to
9 the discussion be maintained as confidential.

10 **OPOA's statement:**

11 The OPOA concurs with the City's statement set forth above.

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27 and thus these findings remain confidential.

28 ² The City notes that the January 26, 2011 officer-involved shooting referenced in the Court's order did not involve an
outside Executive Force of Review Board.

1 Dated: September 2, 2011

2 /s/

3 JOHN L. BURRIS
4 Attorney for Plaintiffs

5 Dated: September 1, 2011

6 /s/

7 JAMES B. CHANIN
8 Attorney for Plaintiffs

9 Dated: September 1, 2011

10 /s/

11 GREGORY M. FOX
12 Attorney for the Defendant

13 Dated: September 1, 2011

14 BARBARA J. PARKER
15 CITY ATTORNEY

16 By: /s/

17 ROCIO V. FIERRO
18 Attorney for the Defendant

19 Dated: September 1, 2011

20 /s/

21 ROCKNE A. LUCIA JR.
22 Attorney for the OPOA
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ATTORNEY ATTESTATION

I hereby attest that I have received telephonic or email authorization for any signatures indicated by a "conformed" signature (/s/) within this E-filed document.

Dated: September 1, 2011

/s/
Gregory M. Fox